

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1439

To be argued by
LEE S. RICHARDS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1439

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES FIGUEROA,

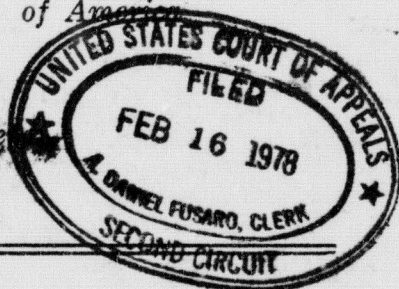
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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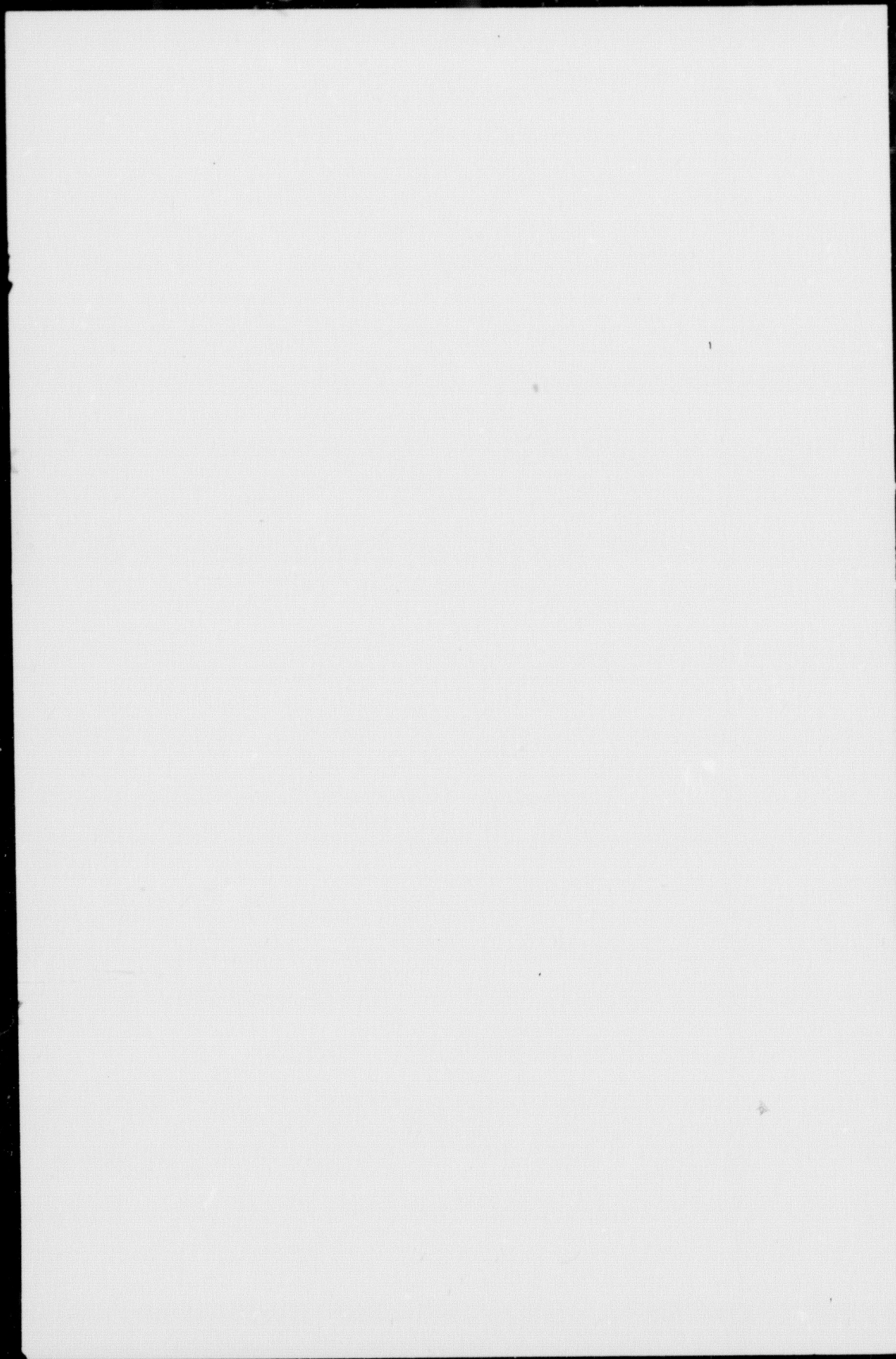


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**United States Court of Appeals
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Docket No. 77-1439

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES FIGUEROA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James J. Figueroa appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 12, 1977, after a plea of guilty before the Honorable Milton Pollack, United States District Judge.

Indictment 77 Cr. 500, filed on July 1, 1977, charged Figueroa with nine counts of bank robbery and two counts of attempted bank robbery, in violation of Title 18, United States Code, Section 2113'(a). On July 7, 1977, Figueroa was arraigned on the indictment and entered a plea of not guilty. Five days later, on July 12, 1977, Figueroa appeared with counsel before Judge Pollack, withdrew his not-guilty plea with respect to Counts One, Seven, Eight, Nine, Ten and Eleven, and entered a guilty plea to each of those counts.

On August 29, 1977, Judge Pollack sentenced Figueroa to concurrent terms of imprisonment of fifteen years on each count to which he had pleaded guilty.*

Figueroa currently is serving his sentence.

Statement of Facts

The instant prosecution arose from a spree of actual and attempted bank robberies committed by James Figueroa during the period from May 10, 1977 through June 24, 1977. In this brief interval, Figueroa, using demand notes which threatened tellers that he had and was prepared to use a gun, held up nine different banks and attempted two further robberies at yet two different banks. Following his arrest, on June 25, 1977, Figueroa was arraigned on a complaint charging him with bank robbery. Thereafter, on July 1, 1977, he was indicted for the nine actual bank robberies and the two attempted robberies.

1. Figueroa's Guilty Plea

At the time of the entry of his guilty plea on July 12, 1977, Figueroa, in open court, first was fully advised of his rights in accordance with Fed. R. Crim. P. 11, and acknowledged a complete understanding of these rights. Among other matters, defendant was advised and acknowledged understanding that on his guilty plea to six counts he could receive consecutive terms of 20 years' imprisonment. (Tr. 4).**

* At the time of Figueroa's sentencing the remaining open counts in the indictment were dismissed on motion of the Government.

** "Tr." refers to pages from the transcript of defendant's guilty plea, entered on July 12, 1977; "Sr." refers to pages from the transcript of defendant's sentence on August 29, 1977.

In the course of his plea allocution, Figueroa described with some detail each bank robbery to which he was pleading guilty. He specifically admitted that in each robbery he used a note which began with the warning "I have a gun," and he acknowledged that on one occasion he threatened to shoot a bank manager who had questioned him. Defendant, however, denied actually having any weapons in the course of the robberies. (Tr. 5-8).

2. Defendant's Sentencing

The defendant, represented by his attorney, Robert Marrow, Esq., was sentenced on August 29, 1977. At the beginning of the proceeding Mr. Marrow spoke extensively on behalf of Figueroa. (Sr. 2-16). Counsel acknowledged that his client had a lengthy criminal record, but attempted to explain it as the product of social difficulties, and argued that it was not a record of violent criminal acts. (Sr. 3-5). Marrow fully explained to the District Court the fact that one of Figueroa's many prior arrests was an arrest for murder which never led to indictment. (Sr. 4). Counsel was given, and took advantage of, a full opportunity to explain his client's hope for rehabilitation and his client's willingness to cooperate with federal authorities in future investigations. (Sr. 5-6, 8 *et seq.*).

At one point during Mr. Marrow's remarks, the District Court asked him directly to comment about defendant's repeated threats, made in the course of the many bank robberies, to use weapons if the money was not turned over. Marrow, in response, argued that his client did not have a gun and therefore never intended to carry out such threats. Counsel referred to the probation report as support for his position, (Sr. 6-7), and Judge Pollack indicated that he found and considered the relevant section of the probation report as Marrow spoke. (Sr. 8).

Mr. Marrow completed his remarks by reading a lengthy letter written by the defendant. (Sr. 10-15). The

defendant Figueroa then spoke directly to the district judge at length, and asked for some leniency, although he stated that he knew he faced a long prison sentence and was going to jail. (Sr. 16-20). The Government made no remarks. (Sr. 20).

After this extensive presentation by the defendant and his lawyer, the District Court carefully reviewed *seriatim* each robbery or attempted robbery the defendant had admitted. (Sr. 20-22). In the course of this account, with respect to one of the six robberies to which Figueroa had pleaded guilty, Judge Pollack noted that a teller recalled seeing Figueroa pointing a handgun at her. (Sr. 21). Judge Pollack then proceeded to carefully review Figueroa's extensive criminal past, which consisted of numerous arrests, multiple convictions, but only a limited amount of time served in jail. (Sr. 22-25). Among the nineteen prior arrests he recounted from the defendant's record, Judge Pollack noted that in one arrest

"there was a charge of attempted murder and assault and possession of a dangerous weapon but there was no indictment filed although he allegedly stabbed a female complainant in the stomach. She was hospitalized for eight days in Jamaica Hospital." (Sr. 24).

Having reviewed carefully the criminal past of Figueroa and the dangerous and serious nature of the protracted crimes for which he then was to be sentenced, the district judge stated that he could not accept the assurances from defense counsel and the defendant about Figueroa's potential for rehabilitation. (Sr. 25-26). Figueroa then was sentenced to fifteen years imprisonment on each count, the sentences to run concurrently.

ARGUMENT

The Sentence Imposed Was Not Based on Constitutionally Impermissible Factors And Did Not Exceed the Sentencing Court's Discretion.

In seeking a remand for resentencing on this appeal, Figueroa alleges that Judge Pollack improperly relied on a prior arrest that did not result in an indictment, unfairly credited over defendant's denial one teller's recollection of a handgun used in one of the six robberies, failed to consider Figueroa's offer to cooperate with the Government, and, disregarded defendant's potential for rehabilitation. Defendant's assertion of these claims simply misreads the record of the sentencing proceeding which shows the experienced District Court giving a fair and proper consideration to the imposition of sentence in this case. Moreover, none of these claims, even if fully credited, supplies any ground for a remand.

It is beyond dispute that under federal law the sentence to be imposed in a given case is a matter solely within the discretion of the trial court. So long as a sentence is imposed within statutory guidelines "appellate review is at an end," absent reliance upon impermissible factors or materially incorrect information. *Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Lamont*, — F.2d —, Dkt. No. 77-1118 slip op. 6337, 6350 (2d Cir. October 28, 1977); *United States v. Mejias*, 552 F.2d 435 (2d Cir. 1977); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976); *United States v. Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975). Cf. *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976). In this case, the concurrent fifteen year sentences imposed by Judge Pollack were well within the statutory limit and Figueroa's attempt to suggest some constitutional violation does not withstand analysis.

First, it is clear that defendant was afforded a full opportunity to make known to the District Court the matters now raised on appeal and that, contrary to defendant's claim, the sentencing judge did not act on inaccurate or erroneous information. Both defense counsel and the district judge plainly recognized that Figueroa's murder arrest had not resulted in an indictment. Both counsel and the defendant emphasized the position that no guns actually had been used in the course of the bank robberies. Defense counsel specifically advised the district judge of Figueroa's willingness to cooperate in the future. And, defendant and his attorney underscored Figueroa's belief that he could be rehabilitated. Thus, this was not a case where the defendant in any way was deprived of an opportunity to be heard at sentencing on disputed matters, or where the sentencing judge was misinformed on pertinent information. *Compare, United States v. Stein, supra; United States v. Robin, supra.*

Nor is there any basis for Figueroa's claim that Judge Pollack specifically relied upon the attempted murder charge or the teller's gun allegation, in imposing sentence in this case. Viewed in their proper perspective, the references to these matters simply did not evidence an intent to increase the harshness of the sentence. See, *United States v. Miller*, — F.2d —, Dkt. No. 77-1302, slip op. 529, 532 (2d Cir. November 25, 1977). The reference to the attempted murder charge was made solely in the context of a complete statement of the defendant's criminal record and the district judge expressly recognized that Figueroa had not been indicted for this incident. Similarly, Judge Pollack's mention of one teller's account that Figueroa pointed a gun at her was made in the course of the trial court's full review of the circumstances of each bank robbery. The district judge's reference to this allegation made clear that it was the teller's account of what happened, and Judge Pollack did not state that he

was giving this matter any particular weight.* Moreover, the district judge plainly was justified in assuring that the record included a full statement of all available information concerning Figueroa, in light of defense counsel's attempt to minimize defendant's lengthy and unfavorable criminal record.

Second, and more importantly, the sentencing judge properly could have considered the attempted murder arrest and the teller's gun allegation, in evaluating defendant's urgings for leniency. Sentencing judges are entitled to consider and weigh all relevant information about the defendant, including crimes of which the defendant was acquitted, *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972); or never convicted, *United States v. Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); counts of an indictment dismissed by the Government, *United States v. Needles*, 472 F.2d 652, 655 (2d Cir. 1973); and hearsay evidence, *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). See *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 328 U.S. 843 (1965); *United States v. Seijo*, *supra*. Moreover, it is clear that even if the district judge had considered these two disputed matters, they hardly were dispositive of the sentence imposed. Figueroa, of course, had committed nine bank robberies and two attempted robberies, in the space of two months. In each case he had employed threats of the use of a gun to obtain the money—threats which, whether or not he intended to carry out, certainly created fear in those to whom they were directed. In the face of such sustained and serious criminal behavior and defendant's obvious indifference to the safety and well-

* In addition, Figueroa and his counsel were given every opportunity to demand a hearing on the use of a gun in this single robbery but they never demanded a hearing that failure precludes defendant from raising the matter on appeal.

being of others, the sentence imposed here would have been appropriate even if Figueroa enjoyed a previously unblemished record.

Finally, Judge Pollack was unequivocally informed of Figueroa's willingness to cooperate, an assertion which was not disputed by the Government or challenged by the court, and of defendant's professed hope for self-rehabilitation. Figueroa's only complaint is that the trial judge understandably gave those considerations less weight than he gave to Figueroa's criminal past. Apart from the fact that defendant's present claim is not a ground for the relief he now seeks, it is frivolous in the extreme to suggest that Judge Pollack abused his discretion in finding that such assurances sounded hollow. In the face of a lengthy criminal record, for which defendant previously had received maximum leniency to no avail, and the outrageous pattern of recent dangerous criminal acts, the sentence imposed here was in all respects fair and proper.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

LEE S. RICHARDS,
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*Assistant United States Attorneys,
 Of Counsel.*

-----X
United States of America

V.

James Figueroa

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:
: AFFIDAVIT OF
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Lee S. Richards being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New York.

That on the 16th day of February, 1978 he
served ^{two} ~~a~~ ^{ies} copy of the within brief
by placing the same in a properly postpaid franked envelope
addressed as follows:

Mark T. Shehan
919 Third Avenue
New York, New York

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing in the
slot for mailing at 1 St. Andrew's Plaza
Borough of Manhattan, City of New York.

Lee S. Richards

Sworn to before me this

16TH day of February 1978

Maria A. Israelian
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

